

# **MONITORING AND ENFORCEMENT OF LAND USE CONTROLS AT FEDERAL FACILITIES: STATE PERSPECTIVE**

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# Introduction

- State RPM on several federal facility remediation projects that include LUCs
- Present an approach used to evaluate:
  - LUCs monitoring and enforcement designs for federal facilities
  - Associated Records of Decision (RODs)
- Not an attorney
- Not a state policy maker



# Outline

- Background
  - Site examples
- State Role in LUCs Design
- Approach for LUCs Design Evaluations:
  - Performance goals for M & E
  - General design requirements
  - ROD requirements











# State Role in LUCs Design

- Review and comment (as provided by CERCLA):
  - Design Documents (RD, LUCIP, etc.)
  - RODs
- Decision Making:
  - Is the proposed design for LUCs monitoring and enforcement acceptable?
  - Should the state concur with the ROD?



# Evaluation Approach

- Identified performance goals for LUCs monitoring & enforcement
- Identified general design requirements to achieve the performance goals
- Identified ROD requirements to ensure post-ROD actions will satisfy the general design requirements
- Use identified requirements to evaluate designs and RODs



# Performance Goals

- Designs: long-term LUCs effectiveness and reliability
- RODs: reasonable assurance that post-ROD M & E activities will be effective and reliable
- Avoid problems identified in recent GAO Study of ICs at 268 non-federal CERCLA and RCRA sites (Report GAO-05-163, January 2005, <http://www.gao.gov/cgi-bin/getrpt?GAO-05-163>)

# General Design Requirements

1. Clear and complete LUCs
2. Landholder monitoring and reporting
3. Regulator confirmation monitoring
4. Regulator enforcement



# 1. Clear and Complete LUCs - Rationale

- Establish what is to be monitored and enforced
- Facilitate effective monitoring design
- Establish clear enforcement triggers

# Clear and Complete LUCs - Design Recommendations

- Identify area(s) where LUCs imposed
- MassDEP approach - specify in detail:
  - Permitted uses
  - Restricted uses
  - Obligations and conditions (plans, OMM, approvals, etc.)
- Ref: <http://www.mass.gov/dep/cleanup/laws/finalpol.htm>

## 2. Landholder Monitoring and Reporting - Rationale

- Monitoring: to ensure timely recognition and response to a LUCs breach
- Reporting: to demonstrate LUCs compliance to regulators and others
- Assign to landholder because landholder is RP (also likely to have presence)
- Address GAO finding of inadequate assignment of monitoring responsibility

# Landholder Monitoring and Reporting - Recommendations

- Goal: ensure continuous LUCs compliance
- Periodic inspections: annual frequency at a minimum to address GAO finding
- Regulator-approved inspection checklist
- Periodic reporting: annual frequency at a minimum to facilitate regulator review
- Landholder report certification: to affirm responsibility and facilitate enforcement

# 3. Regulator Confirmation Monitoring - Rationale

- Provide competent independent confirmation of LUCs compliance; self-monitoring not reliable
- Ensure timely response to LUCs breach if landholder fails to respond
- Address GAO finding of inadequate assignment of monitoring responsibility



# Regulator Monitoring – Design Recommendations

- Goal: confirm implementation of landholder monitoring, rather than duplicating effort
- Conduct annual site inspections
- Use legal instrument (e.g., covenant, FFA) to ensure ability to conduct site inspections before and after property transfer
- Identify anticipated source of funding before monitoring begins

## 4. Regulator Enforcement - Rationale

- Provide competent independent ability to respond to LUCs breach if landholder fails to respond; self-enforcement not reliable
- Address GAO finding of inadequate assignment of enforcement responsibility

# Regulator Enforcement – Design Recommendations

- Establish specific enforcement tools (penalties, additional cleanup, property reversion, etc.) before monitoring begins
- Use a legal instrument (covenant, FFA) to ensure ability to enforce compliance before and after property transfer and to address GAO finding (informational controls)
- Identify anticipated source of funding before monitoring begins



# ROD Requirements

- Goals:
  - Provide reasonable assurance post-ROD M & E activities will be effective and reliable
  - Address GAO decision document findings: vague objectives, vague controls, timing and duration not specified, monitoring and enforcement responsibilities not specified
- Approach: Evaluate RODs using a checklist based on essential design components

# ROD Requirements – Clear and Complete LUCs (1)

- Identify LUCs area(s)
- Identify permitted uses in detail
- Identify restricted uses in detail
- Identify obligations and conditions
- Specify duration of LUCs
- Specify timing for implementation



# ROD Requirements – Landholder Monitoring and Reporting (2)

- Identify the landholder monitoring activities
- Summarize inspection requirements:
  - Specify frequency (annual minimum)
  - Regulator-approved checklist
- Summarize compliance report requirements:
  - Frequency (annual minimum)
  - Certification
  - Submission to regulator(s)

# **ROD Requirements – Regulator Confirmation Monitoring (3)**

- Identify responsible regulatory agency
- Summarize the regulator monitoring activities
- Identify the legal instrument that will ensure ability to monitor
- Address pre- and post-transfer scenarios (e.g., post-transfer legal rights, cleanup trigger, reversionary interest)
- Identify anticipated source of funding



# ROD Requirements – Regulator Enforcement (4)

- Identify responsible regulatory agency
- Identify specific enforcement tools
- Identify the legal instrument that will ensure ability to enforce
- Address pre- and post-transfer scenarios (e.g., post-transfer legal rights, cleanup trigger, reversionary interest)
- Identify anticipated source of funding



# ROD Requirements – Post-ROD Documents

- Identify all post-ROD documents that will include LUCs M & E provisions (RAWP, RD, LUCIP, LTMP, etc.)
- Summarize LUCs M & E provisions of post-ROD documents in the ROD
- Specify: all post-ROD documents subject to regulator approval



